

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**SHAWN BROWN, OZAN CIRAK,  
LUKE SMITH and THOMAS HANNON,  
each individually and on behalf of all others  
similarly situated**

**Plaintiffs,**

**Case No.: 1:07-CV-06356-JSR  
Related Case No.: 1:04-MD-01598-JSR**

**vs.**

**GENERAL NUTRITION COMPANIES, INC.**

**Defendant.**

\_\_\_\_\_ /

**PLAINTIFFS' RESPONSE AND  
OPPOSITION TO COURT'S NOTICE OF MOTION TO DISMISS**

Plaintiffs, SHAWN BROWN, OZAN CIRAK, LUKE SMITH and THOMAS HANNON, ("Plaintiffs"), file this response in opposition to the Court's Notice of Motion to Dismiss and state as follows:<sup>1</sup>

This is a proposed consumer class action case asserting purely state law claims against GNC for the "over the counter" marketing and sale of four related steroid products commonly referred to as "Andro". This case has not been certified as a class action. Plaintiffs are not seeking any relief for personal injuries suffered by any class members. In addition to this case, there are three other state law Andro GNC cases removed to this Court, and a California GNC Andro case remanded back to California state court in Los Angeles. After the final decree in the Muscletech insolvency proceeding, Plaintiffs and GNC entered into a stipulation for dismissal of the claims against GNC for the sale of Muscletech products.

---

<sup>1</sup> The undersigned counsel recognizes that the Notice of Motion to Dismiss provided "ALL PAPERS IN OPPOSITION TO DISMISSAL WITH PREJUDICE must be filed, and courtesy copies must be delivered to Chambers and e-mailed to the Special Master, on or before July 7, 2008." Due to a calendaring error by the undersigned this Response was filed late. The undersigned apologizes for this oversight and respectfully request the

This stipulation was filed after the parties contacted the Special Master, Mr. James Niss about filing the Remand/Abstention motion. The parties agreed with Mr. Niss on a briefing schedule for Plaintiffs' Motion to Remand or for Abstention. The basis of the remand/abstention motion is that after the dismissal of the Muscletech-related claims against GNC, the sole basis of federal court jurisdiction (i.e., "related to" bankruptcy court jurisdiction) was no longer present in this non-personal injury state law consumer class action. After Plaintiffs filed their Motion for Remand/Abstention and GNC filed its opposition, the parties jointly contacted Mr. Niss and requested a delay in the Court hearing the Remand/Abstention motion (in this and the other three cases) so the parties could go to mediation and otherwise discuss settlement. The mediation occurred on January 29, 2008 before retired federal district court Judge Lawrence Irving in San Diego. Although the case did not settle on January 29, 2008, Judge Irving continued conversations with Plaintiffs' counsel and (the undersigned reasonably believes) with GNC's counsel in an attempt to resolve the case. Class certification in the GNC Andro California case was subsequently briefed with a class certification hearing set for June 10, 2008. It was the general belief that issues to be resolved at the California class certification hearing may aid the parties in settling all of the GNC Andro cases.

Plaintiffs respectfully submit that the Motion to Dismiss should be denied and instead, Plaintiffs' Motion to Remand/Abstention should be set for hearing. Dismissal of this and the related cases is not warranted. Counsel for Plaintiffs apologizes to the extent that counsel may not have complied with the provisions of any case management order. Plaintiffs wish to pursue these cases on behalf of themselves and the other members of the class. The Remand/Abstention motions are fully briefed, permitting this matter to be resolved promptly.

---

Court consider this Response.

Thus, Plaintiffs, SHAWN BROWN, OZAN CIRAK, LUKE SMITH and THOMAS HANNON, respectfully request that this Court deny the Motion to Dismiss, schedule the Plaintiffs' Motion for Remand/Abstention for hearing on the Court's next available status conference, and grant such other relief as the Court deems just.

Dated: July 9, 2008

Respectfully submitted,

/s/ John D. Goldsmith

JOHN D. GOLDSMITH

Fla. Bar No. 444278

[jgoldsmith@trenam.com](mailto:jgoldsmith@trenam.com)

KATIE M. BRINSON

Fla. Bar No. 0022367

TRENAM, KEMKER, SCHARF,

BARKIN, FRYE, O'NEILL & MULLIS,

Professional Association

P.O. Box 1102

Tampa, FL 33602

Phone: (813) 223-7474

Fax: (813) 229-6553

-and-

CRAIG S. HILLARD (CH-1737)

[chillard@stark-stark.com](mailto:chillard@stark-stark.com)

STARK & STARK

993 Lenox Drive

Lawrenceville, New Jersey 08648

Phone: (609) 895-7346

Fax: (609) 895-7395

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing Plaintiffs' Response and Opposition to Court's Notice of Motion to Dismiss has been sent via ECF and US Mail to: James Marks, Esq., 195 Broadway, NY, NY 10007, and James Munisteri, Esq., 1000 Louisiana, Suite 3400, Houston, TX 77002 on this 9<sup>th</sup> day of July, 2008.

\_\_\_\_\_  
/s/ John D. Goldsmith

Attorney